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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE BOEING COMPANY, Plaintiff, v. MAZIAR MOVASSAGHI, in his official capacity as the Acting Director of the California Department of Toxic Substances Control, Defendant.	Case No. CV 10-04839-JFW (MANx) **JOINT SCHEDULING REPORT** Judge: Hon. John F. Walter Courtroom: 16 Date: August 2, 2010 Time: 8:30 a.m.

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Plaintiff The Boeing Company ("Boeing") and Defendant Maziar Movassaghi, in his capacity as Acting Director of the California Department of Toxic Substances Control ("DTSC"), jointly submit this report in accordance with the Court's Order of July 8, 2010, Fed. R. Civ. P. 26(f), and Local Rule 26-1.

Boeing commenced this action on November 13, 2009, by filing a Complaint in the U.S. District Court for the Eastern District of California challenging the constitutionality of a California state law, Senate Bill 990 ("SB 990"), Cal. Health & Safety Code § 25359.20. Boeing filed an Amended Complaint on December 28, 2009, and DTSC filed its Answer on January 8, 2010. Dkt. Nos. 22, 25. The pleadings raise the following issues: (1) whether SB 990 is invalid because, as Boeing alleges, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.*, preempts the entire field of nuclear safety; (2) whether SB 990 conflicts with, and is thus preempted by, federal law; (3) whether SB 990 violates the doctrine of intergovernmental immunity; (4) whether SB 990 violates the Equal Protection Clause of the Fourteenth Amendment; and (5) whether SB 990 violates the Due Process Clause of the Fourteenth Amendment. Dkt. No. 22. DTSC denies each asserted allegation of invalidity. Dkt. No. 25.

On January 22, 2010, Boeing filed a Motion for Summary Judgment on its field preemption and intergovernmental immunity claims, which DTSC opposed on February 19, 2010. Dkt. Nos. 27, 29. On March 2, 2010, the Southern California Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility, Rocketdyne Cleanup Coalition, and Committee to Bridge the Gap filed an amicus brief in opposition to summary judgment. Dkt. No. 33. Boeing filed its reply on May 7, 2010. Dkt. No. 40. On March 5, 2010, and May 10, 2010, Judge Garland E. Burrell approved the parties' stipulations postponing proceedings to permit time for discussions with the United States and, ultimately, scheduled oral argument on the Motion for Summary Judgment for June 21, 2010. Dkt. Nos. 36, 42.

Before hearing argument on Boeing's Motion for Summary Judgment, on May

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25, 2010, Judge Burrell ordered the parties to show cause why venue should not be transferred to the Central District of California, and on June 18, 2010, Judge Burrell ordered this case transferred to the Central District. Dkt. Nos. 44, 50.

I. Jurisdiction, Venue, And Parties

This Court's subject-matter jurisdiction is based on 28 U.S.C. § 1331 and § 1343(a)(3). Venue under 28 U.S.C. § 1391(b) and personal jurisdiction are proper. No additional parties remain to be served.

II. Factual Background

This case is a challenge to the constitutionality of SB 990, a state law that was enacted in October 2007 to specifically address the cleanup of the Santa Susana Field Laboratory ("SSFL"). Cal. Health & Safety Code § 25359.20(1)(a). "Founded in the late 1940s, [SSFL] was a facility dedicated to the development and testing of nuclear reactors, rockets, missiles and munitions." *Id.* § 25359.20(2)(a). SSFL is located in the Simi Hills area of Ventura County, California, and Boeing (or one of its predecessors) has owned property at SSFL since the late 1940s. The federal government has owned property at the site since the 1950s, which it currently administers through the National Aeronautics and Space Administration ("NASA"), and has leased from Boeing approximately 90 acres at the site, which the Department of Energy ("DOE") administers.

Activity at SSFL included, among other things: a nuclear research and development program, conducted by DOE (or one of its predecessors) under the authority of the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.*, and performed by Boeing (or one of its predecessors) under a prime contract with DOE; other non-DOE work conducted by Boeing (or one of its predecessors); and rocket and munitions testing conducted by NASA and other federal agencies, including work performed by Boeing (or one of its predecessors) on behalf of the federal government.

Before SB 990 was enacted, regulation of the cleanup of the SSFL site was allocated between state and federal authorities based on the nature of the

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contamination. DTSC supervised the cleanup of non-radiological contamination pursuant to the State's generally applicable hazardous waste management laws, Cal. Health & Safety Code ch. 6.5. Those laws apply to the federal government and its contractors pursuant to a waiver of federal immunity for state laws governing the cleanup of non-radiological material that regulate the government "in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961(a)(2). In contrast, DOE supervised the cleanup of radiological contamination at SSFL pursuant to various federal rules.

In SB 990, the California Legislature declared that the enactment of a statute specifically addressing the cleanup of contamination at the SSFL site was supported by certain "unique circumstances," which are set forth in Section 2 of SB 990, including DOE's reliance on what the Legislature believed were "less protective cleanup standards." The specific portions of SB 990 that are at issue in this action also include: the enactment of a special statute dealing with the SSFL site rather than a statute of general application; DTSC's regulation of the investigation, characterization, and cleanup of radiological material at the site; and certain substantive cleanup requirements, including a requirement that DTSC sum "the cumulative risk from radiological and chemical contaminants at the site," and that it assume that the site will be used in the future for "either suburban residential or rural residential (agricultural)" purposes, "whichever produces the lower permissible residual concentration for each contaminant." Cal. Health & Safety Code § 25359.20 (a), (c). It is Boeing's position, disputed by DTSC, that these requirements do not exist under generally applicable state law. In addition, SB 990 makes it illegal for Boeing to "sell, lease, sublease or otherwise transfer" its land at SSFL until DTSC certifies "that the land has undergone complete remediation pursuant to the most protective standards." *Id.* § 25359.20(1)(d), (e).

Boeing submits that no facts material to its field preemption or intergovernmental immunity claims are disputed. *See* Dkt. Nos. 27, 40.

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DTSC, however, submits that the following facts, which Boeing disputes, are among those material to a resolution of these issues: "that California has a major role under the Atomic Energy Act to regulate contamination at the SSFL, particularly contamination caused by Boeing's non-DOE work"; the extent of Boeing's non-DOE work at the SSFL site; "that SB 990 does not impose more stringent standards than would ordinarily apply to a cleanup under state and federal law"; and "that California could indeed impose requirements regarding cleanup of radiological contamination, including more stringent standards, in any event, because of its status as an Agreement State"–a written delegation of certain authority to California under provisions of the Atomic Energy Act. Dkt. No. 29 at 28-29. Boeing disputes that such delegation is applicable here.

III. Points Of Law

The following points of law are disputed and were the subject of Boeing's Motion for Summary Judgment: (1) whether SB 990 is invalid in its entirety because it is preempted by the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.*, because it seeks to regulate for safety purposes certain radiological materials subject to exclusive federal regulation under the Atomic Energy Act's pervasive regulatory scheme, *see, e.g.*, *Silkwood v. Kerr-McGee*, 464 U.S. 238, 249, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984); *U.S. v. Manning*, 527 F.3d 828, 831 (9th Cir. 2008); *U.S. v. Kentucky*, 252 F.3d 816, 823 (6th Cir. 2001); and (2) whether SB 990 is invalid in its entirety because it singles out and seeks to regulate directly the federal government, its contractor, and its facilities in a manner that violates the doctrine of intergovernmental immunity, *see North Dakota v. U.S.*, 495 U.S. 423, 437, 109 L.Ed.2d 420, 110 S.Ct. 1986 (1990) (plurality); *Moses Lake Homes v. Grant Cnty.*, 365 U.S. 744, 751, 6 L. Ed.2d 66, 81 S.Ct. 870 (1961).

In its opposition brief, DTSC raised the following disputed points of law: (1) whether SB 990 is valid because Boeing has not overcome the presumption that Congress does not intend to supplant state law, especially in the areas of traditional state regulation, such as land use, public health and safety, and environmental protection, *see*

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N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 131 L.Ed.2d 695, 115 S.Ct. 1671 (1995); (2) whether SB 990 is valid, and has not been preempted by the Atomic Energy Act, because federal law has reserved to the States certain aspects of the regulation of radiological safety, which DTSC alleges includes "land use" determinations related to radiological cleanup, *see Pac. Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 211-12, 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983); and (3) whether SB 990 is a valid exercise of California's authority under the 1962 Agreement between the then-Atomic Energy Commission and the State, which remains in effect and which delegates to the State "the authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiations hazards," *see* 42 U.S.C. § 2021.

In addition, the following points of law are disputed, but were *not* the subject of Boeing's Motion for Summary Judgment: (1) whether SB 990 is preempted by federal law because it conflicts with and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and DOE, *see Jones v. Rath Packing*, 430 U.S. 519, 526, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977); *Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990); (2) whether SB 990, which is directed specifically and exclusively at the SSFL site, singles out Boeing for disparate treatment without justification, thus depriving Boeing of its rights, privileges, or immunities secured by the Fourteenth Amendment of the Constitution of the United States, *see Village of Willowbrook v. Olech*, 528 U.S. 562, 563-566, 145 L.Ed.2d 1060, 120 S.Ct. 1073 (2000) (per curiam); and (3) whether SB 990 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it irrationally and arbitrarily deprives Boeing of a substantial property right, *see Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395, 71 L.Ed. 303, 47 S.Ct. 114 (1926). DTSC disputes Boeing's contentions on these issues based, in part, on the principles set forth in the above paragraph–*i.e.*, that the State's authority to regulate in the traditional areas of land use, public health and safety, and environmental

protection are paramount to any alleged claims of field or conflict preemption, disparate treatment, or deprivation of property rights. DTSC reserves the right to provide additional authorities at the time such issues are heard by motion or otherwise.

IV. Prior And Pending Motions

On January 22, 2010, Boeing filed a Motion for Summary Judgment on its field preemption and intergovernmental immunity claims (Counts 1-3 of its Amended Complaint). That Motion was fully briefed and scheduled for oral argument in the Eastern District of California on June 21. Dkt. No. 42. This case was transferred to this Court on June 18, 2010, and on July 9, 2010, this Court denied that Motion without prejudice to re-filing in accordance with the Court's Scheduling and Case Management Order. Dkt. Nos. 50, 79. The parties respectfully request that this Court treat their previously filed summary judgment papers as filed consistent with the local rules and this Court's Standing Order. The parties request that the Court schedule a hearing on the Motion for Summary Judgment on September 20, 2010, or at such later time as convenient for the Court.

Other than scheduling stipulations, no other motions have been filed in this case, and the parties do not currently anticipate filing any other motions prior to the resolution of Boeing's Motion for Summary Judgment.

V. Amendment Of Pleadings

No addition or dismissal of parties, claims, or defenses is contemplated at this time. The parties propose a 30-day time period following the resolution of Boeing's Motion for Summary Judgment for amendment of the pleadings.

VI. Initial Disclosures Pursuant To Fed. R. Civ. P. 26

The parties have stipulated, with the approval of Magistrate Judge Nagle, to dispense with initial disclosures. Dkt. No. 86.

VII. Discovery Taken To Date And Proposed Discovery Plan

No discovery has been taken to date. Boeing respectfully submits that discovery is unnecessary because this case can be resolved on pure issues of law. It is

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DTSC's position that discovery will be necessary should Boeing's Motion for Summary Judgment be denied. The parties have agreed that discovery should be stayed pending the disposition of Boeing's Motion for Summary Judgment, but DTSC reserves the right, at the hearing, to request that the Court withhold determination of the motion until after a limited period of discovery.

In the event, however, that discovery is required, the parties propose the following discovery plan:

A. Changes Regarding Disclosures Under Rule 26(a). As noted above, the parties have stipulated, and the Magistrate Judge has ordered, that they may dispense with the initial-disclosure requirement.

B. Subjects On Which Discovery May Be Needed And Schedule. If discovery is needed, the parties propose the following schedule. The parties anticipate that fact discovery will not be extensive. Subjects of potential discovery include aspects of the operational, regulatory, and contamination histories of SSFL and other sites in the State and the background of the adoption of SB 990. Dates herein are based on an assumption that this Court rules on Boeing's Motion by November 22, 2010:

Fact Discovery Cut-Off	four months after disposition of Boeing's motion for summary judgment (March 22, 2011)
Initial Expert Reports	one month after fact discovery cut-off (April 22, 2011)
Close of Expert Depositions	three weeks after initial expert reports (May 13, 2011)
Rebuttal Expert Reports	two weeks after close of expert depositions (May 27, 2011)
Rebuttal Expert Depositions	three weeks after rebuttal reports (June 17, 2011)

C. Electronically Stored Information. The parties do not anticipate issues arising with regard to electronically stored information, such as the need to produce electronic records in a particular electronic format.

D. Claims Of Privilege Or Protection. If privileged material is inadvertently

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produced, the party in receipt of such material shall promptly return it, and privilege shall not be considered waived.

E. Changes That Should Be Made In Limitations On Discovery. None.

F. Any Other Orders Pursuant To Rule 26(c) Or Rule 16(b) Or (c). Certain documents or information that may be produced in discovery in this proceeding may contain confidential information. Accordingly, the parties are negotiating, and expect to stipulate to, a protective order that will be submitted to the Magistrate Judge. In addition, because aspects of this case involve the government's nuclear research program, issues may arise over material that may be classified, subject to export controls, or otherwise restricted by federal law. Should any discovery requests seek the production of documents containing such material, the parties will confer regarding an appropriate resolution consistent with their obligations under federal law.

VIII. Related Cases Or Proceedings

No related cases or proceedings are pending before another judge of this Court or any administrative agency. In 2007, the U.S. District Court for the Northern District of California decided a case addressing issues related to DOE's compliance with the National Environmental Policy Act in connection with its remediation activity at SSFL. *See NRDC v. DOE*, 2007 WL 1302498 (N.D. Cal. May 2, 2007). The court has retained jurisdiction pending DOE's compliance with its order to prepare an Environmental Impact Statement. Neither Boeing nor DTSC was a party, but the State was an amicus curiae in support of NRDC and the other plaintiffs.

IX. Relief Sought

Boeing seeks a declaration that SB 990 is invalid and unconstitutional in its entirety, an injunction preventing DTSC from enforcing or taking any action against Boeing based on SB 990, and other such relief as may be just and proper. Boeing has not sought damages or attorney's fees.

X. Interested Parties Or Persons

Boeing filed the required Certification as to Interested Parties on July 14, 2010.

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Dkt. No. 83. Boeing has a financial interest in the outcome of this case. State Street Bank and Trust Company, a wholly owned subsidiary of State Street Corporation, which is a publicly traded company, owns more than 10% of the outstanding Boeing stock. Boeing has no parent company. *See also* Dkt. No. 1-4. Other than federal agencies including DOE and NASA, and amici herein, the parties are currently unaware of any other persons, firms, partnerships, corporations, or other entities that have a financial interest or any other interest in the outcome of this proceeding.

As a governmental party, DTSC is exempt from Local Rule 7.1-1.

XI. Proposed Dates For Discovery, Motions, Pretrial, And Trial

It is Boeing's position that this case should be decided on summary judgment, but in the event a trial becomes necessary, the parties propose the following schedule. Dates included herein are based on an assumption that this Court rules on Boeing's Motion for Summary Judgment by November 22, 2010:

Completion of Discovery	seven months after disposition of Boeing's summary judgment motion (May 17, 2011)
Last Date for Hearing of Motions for Summary Judgment	three months after completion of discovery (September 19, 2011)
Final Pretrial Conference	three months after last date for hearing of substantive motions (December 19, 2011)
Trial Date	one month after final pretrial conference (January 16, 2012)

XII. Jury Demand

Neither party has demanded a jury trial. It is Boeing's position that two weeks should be reserved for trial. DTSC submits that two to three weeks should be reserved for trial. The parties will meet and confer in advance of trial to narrow the issues of fact and propose procedures to streamline the proceedings.

XIII. Settlement Efforts

The parties have been in negotiations regarding the interpretation and application of SB 990 since shortly after its passage in October 2007, including

attempting to reach agreement on technical application of SB 990 throughout 2008, followed by a more than ten-month effort in 2009 seeking to negotiate a consent order to resolve the dispute. While the parties remain open to pursuing further settlement discussions, the inability to reach consensus despite significant time spent to date and the potential for impacts on cost and the remediation schedule if resolution of the dispute is further delayed, support moving forward with the litigation schedule.

XIV. Complexity Of Case

The parties agree that this case is not complex and reference to the *Manual on Complex Litigation* is unnecessary.

XV. Dispositive Motions

Boeing filed a Motion for Summary Judgment on January 22, 2010. That Motion was fully briefed and awaiting oral argument when this case was transferred on June 18, 2010. On July 9, 2010, this Court denied that Motion without prejudice to refiling in accordance with the Court's Scheduling and Case Management Order that will be issued after the Scheduling Conference. The parties have not filed any other dispositive or partially dispositive motions, nor do they anticipate filing any other such motions at this time, except as set forth above.

XVI. Unusual Legal Issues

None.

XVII. Severance, Bifurcation, Or Other Ordering Of Proof

None.

XVIII. ECF

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Respectfully submitted,

Dated: July 23, 2010

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